RECENT AMERICAN DECISIONS.

Supreme Court of Rhode Island.

MARY O'RORKE *v.* MARY SMITH.

M. C. owning a tract of land bounded N. by a street, conveyed to D. the west portion, whereon was a well, reserving a right to use the well by the words "excepting a privilege to the well of water on said lot which I reserve for the use of my said homestead estate," this homestead estate being the remainder of the tract. Subsequently M. C. devised to J. in fee simple the land between the house and the lot conveyed to D., together with a tenement in the house, and to S. the rest of the homestead estate. For a long period, but not for the time required to gain an easement by prescription, all the occupants of the homestead estate had crossed the land between the homestead and D.'s lot on their way to the well. In trespass *quare clausum* brought by the grantees of J. against S., *held*, that the way across J.'s lot could not be claimed as a way of strict necessity. *Held*, further, that the way could not be implied from the circumstances of the case as one reasonably necessary.

Query. Whether the grant of a way existing *de facto* can be implied except in cases of strict necessity.

Semble, that the claimant of such grant must be required to show that without the way he will be subjected to an expense excessive and disproportioned to the value of his estate, or that his estate clearly depends for its appropriate enjoyment on the way, or that some conclusive indication of his grantor's intention exists in the circumstances of his estate.

EXCEPTIONS to the Court of Common Pleas.

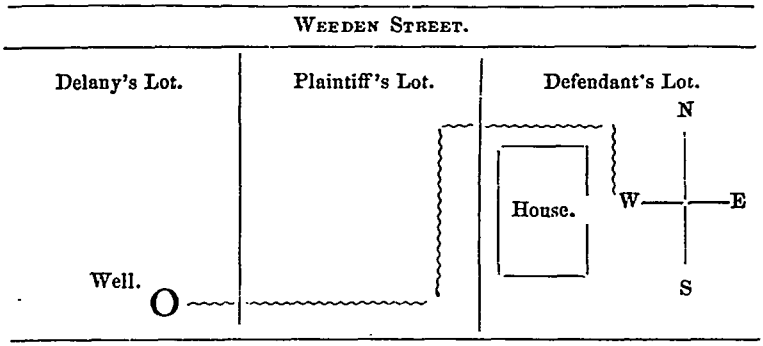
This was an action of trespass *quare clausum fregit*, to which the defendant pleaded in justification a right of way. The action was tried in the Court of Common Pleas to the court, and judgment rendered for the defendant. It came up to this court by bill of exceptions, the exceptions being accompanied by a statement of facts proved on the trial; in substance as follows:—

The plaintiff and the defendant were owners of adjoining lots fronting on Weeden street, in the former town of North Providence, now Pawtucket. The two lots were formerly part of a larger estate belonging to Michael Coyle. On the 11th May 1866, Coyle sold the part not covered by the two lots to P. G. Delany. On the part so sold there was a well. In the deed to Delany, Coyle reserved a right to use the well in the following words, viz.: "Excepting a privilege to the well of water on said lot, which I reserve for the use of my said homestead estate." The two lots now owned by the plaintiff and the defendant were embraced in what was then the "said homestead estate." Michael Coyle lived there after the sale till his death. He died after May 16th 1866, leaving a will bearing date of that day, which was approved November 5th 1866. In the will he devised the homestead estate to his wife for life, and, after her decease, to his son, John Coyle, and his

daughter, Mary Smith, the defendant, in fee simple, devising to John the tenement occupied by himself, with the lot of land westerly from the house, being the lot now owned by the plaintiff, and to Mary Smith the basement and attic tenements, with the share of land belonging to the same on the easterly side thereof, being the lot which she now owns. The widow of Michael Coyle died many years ago. The part of the homestead estate devised to John Coyle came to the plaintiff by mesne conveyances previous to June 17th 1872. The part devised to Mary Smith was in her possession June 17th 1872. The lot now owned by the plaintiff is nearest the land sold to Delany. A path leading from the defendant's lot to the well crosses the plaintiff's lot. The tenants and occupiers of all portions of the homestead house had, for some years (but not twenty years), both before and after the death of Michael Coyle, used the well, and the path to go to and from the well, when they saw fit. The plaintiff built a fence across the path on the line between his lot and the defendant's, and on the line between his lot and the Delany lot. On the 17th June 1872, the defendant removed the lengths of fence stretching across the path, as being obstructions to her right of way along the path to and from the well, this removal being the trespass complained of.

The statement showed, in addition to the facts above stated, that both parties could go to the well in another way, by first passing directly from their own lots into Weeden street, then down Weeden street to the Delany lot and across the Delany lot; but this way was not the accustomed way—was more burdensome to the Delany lot, and it was not known that the owners of the Delany lot would consent to its use.

The diagram represents the premises.



The wave line is the route taken by the defendant to the well.

Browne & Van Slyck, for plaintiff.

P. E. Tillinghast, for defendant.

The opinion of the court was delivered by

DURFEE, C. J.—The plaintiff contends that Michael Coyle, being the absolute owner of the estate, had the right to dispose of the lot which he now owns unencumbered by the way; that Michael did so dispose of it when he devised it to John Coyle in fee simple, and that under John Coyle he holds it unencumbered.

The defendant contends that by force of the reservation in the deed to Delany, the privilege of the well became appurtenant to the homestead estate and to every part of it, and consequently to the part which she now owns, and that inasmuch as she cannot use the privilege without the way, she is entitled to the way, either as a way of strict necessity, or as a way which, being reasonably necessary, may be implied from the circumstances.

1. We do not think the defendant is entitled to the way as a way of strict necessity. Ordinarily, such a way is implied as incident to an express grant upon the presumption that when a man grants a thing he intends likewise to grant that without which the thing granted cannot be enjoyed. The privilege of the well has not been expressly granted or devised. If it passed to the defendant it passed to her as appurtenant to the estate which was devised to her, and that, too, without any mention, even in the most general way, of appurtenances. Now it will not be denied that Michael Coyle had the power to devise the estate without the privilege. He might have done so in express terms. Or, again, he might have expressly devised the intervening lot unencumbered by the way, in which case the privilege, if dependent on the way, would be extinguished by implication. The devise of the intervening lot in fee simple was *primâ facie* equivalent to such a devise; for *primâ facie* it gave the devisee as perfect an estate as the devisor himself had, and the devisor himself had an estate so unencumbered.

2. Is the plaintiff entitled to the way as a way which, being reasonably necessary, may be implied from the circumstances of the estate?

The law in regard to the creation of easements by implication where estates which have been united in a single ownership are severed by deed, will, or partition, is elaborately discussed in the

third and last edition of Washburn on Easements and Servitudes, published in 1873. The cases there collected and collated are somewhat discordant, but they are very generally to the effect that where the easement or *quasi* easement is continuous, apparent, and reasonably necessary to the beneficial enjoyment of the estate for which it is claimed, a grant thereof will be implied. The rule applies especially in favor of easements of air and light, lateral support, partition walls, drains, aqueducts, conduits, and water-pipes or spouts, all these being continuous easements technically so called—that is to say, easements which are enjoyed without any active intervention of the party entitled to enjoy them. Ways are not in this sense continuous easements, but discontinuous or non-continuous, being enjoyed only as they are travelled. This distinction, however, between ways and the other easements mentioned has not been uniformly regarded, and there are cases, especially in Pennsylvania, in which it has been held that ways which are visibly and permanently established on one part of an estate for the benefit of another will, upon a severance of the estate, pass as implied or constructive easements appurtenant to the part of the estate for the benefit of which they were established: *Kieffer* v. *Imhoff*, 26 Penna. St. 438; *McCarty* v. *Kitchenman*, 47 Id. 239; *Phillips* v. *Phillips*, 48 Id. 178; *Pennsylvania Railroad Co.* v. *Jones*, 50 Id. 417; *Cannon* v. *Boyd*, 73 Id. 179; *Thompson et al.* v. *Miner*, 30 Iowa 386; *Huttemeier* v. *Albro*, 2 Bosw. 546; affirmed, 18 N. Y. 48. But in New Jersey the doctrine was held to be inapplicable to ways: *Fetters* v. *Humphreys et als.*, 19 N. J. Eq. 471. And there are many English cases in which the application of the doctrine to ways has been denied: *Pheysey et ux.* v. *Vicary*, 16 M. & W. 484; *Whalley* v. *Thompson et al.*, 1 Bos. & Pul. 371; *Worthington* v. *Gimson*, 2 El. & E. 618; *Dodd* v. *Burchell*, 1 H. & C. 113; *Polden* v. *Bastard*, 4 B. & S. 258, and affirmed, Law Rep. 1 Q. B. 156; *Thompson* v. *Waterlow*, Law Rep. 6 Eq. 36; *Langley et al.* v. *Hammond*, Law Rep. 3 Exch. 161; and see *Pearson* v. *Spencer*, 1 B. & S. 571, and affirmed, 3 B. & S. 761; *Daniel* v. *Anderson*, 31 L. J. N. S. 610, cited in Washburn on Easements, 3d ed. 59.

In *Dodd* v. *Burchell*, 1 H. & C. 113, the owner of an estate had conveyed a part of it upon which there was a way which he claimed to be entitled to by implied reservation, upon the ground that there had been a continuous user of it for a number of years,

and that without it the land retained could not be reasonably enjoyed. The Court of Exchequer decided against the claim. Chief Baron POLLOCK said: "There is a wide difference between that which is substantial, as a conduit or watercourse, and that which is of an incorporeal nature, as a right of way. In my opinion if we were to adopt the principle contended for, it would be a most dangerous innovation of modern times. The law seems to me particularly careful and anxious to avoid important rights to land being determined by parol evidence and the prejudices of a jury."

In *Worthington* v. *Gimson*, 2 El. & E. 618, Justice CROMPTON uses the following language: "It is said that this way passed as being an apparent and continuous easement. There may be a class of easements of that kind, such as the use of drains or sewers, as part of the necessary enjoyment of the severed property. But this way is not such an easement. It would be a dangerous innovation if the jury were allowed to be asked to say from the nature of a road whether the parties intended the right of using it to pass."

In *Polden* v. *Bastard*, 4 B. & S. 258, the owner of two adjoining estates devised them to different persons. There was on one of them a well and pump to which the tenant of the other was, when the will was made, and for some time before had been, in the habit of resorting for water, with the knowledge of the testatrix, using a foot-way from his dwelling house into the yard where the pump was. He had no supply of water on his own premises, but might have obtained it there by digging a well fifteen or twenty feet deep. The testatrix devised the premises "as now in the occupation" of the tenant. The devisee sold to the defendant, who claimed the right to use the pump. The claim was not sustained. ERLE, C. J., said: "There is a distinction between easements, such as a right of way or easements used from time to time, and easements of necessity or continuous easements. The laws recognise this distinction, and it is clear that upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner, by appropriate language, shows an intention that they should pass. The right to go to a well and take water is not a continuous easement, nor is it an easement of necessity."

We share the feeling expressed in these cases in regard to making rights in real estate dependent upon facts and circumstances which may be differently interpreted by different minds. If the grant of a way, existing previously *de facto*, can be implied from anything short of necessity, we think at any rate that the party claiming the way should be required either to show, as in *Pettingill* v. *Porter*, 8 Allen 1, that without the use of the way he will be subjected to what, considering the value of the granted estate, will be an excessive expense; or to show, as in *Thompson et al.* v. *Miner*, 30 Iowa 386, that there is a manifest and designed dependence of the granted estate upon the use of the way for its appropriate enjoyment, or to adduce some other indication equally conclusive; and see *Worthington* v. *Gimson*, 2 El. & E. 618; *Leonard* v. *Leonard*, 7 Allen 277, 283.

In the case at bar the legal grounds of the decision made in the court below are not explicitly stated, but only the decision itself, and the facts on which it was based. The question for us, as submitted to us in argument, is whether, the facts being as stated, the decision was right. We think it was not. It does not appear that the defendant's estate is dependent on the Delany well for its water supply, nor that the defendant has not a well of her own or could not make a well for herself at moderate cost. And in regard to the way, it does not appear to have been established in the lifetime of Michael Coyle so definitely as to show a *decision* on his part to subject the part of the estate now owned by the plaintiff to a *quasi* servitude in favor of the other part—as, for instance, he might have done by inclosing the way with a fence, which should connect it with the part now owned by the defendant. Indeed, we do not see that the case at bar differs materially from *Polden* v. *Bastard*, 4 B. & S. 258, above cited; for, as we have seen, the privilege of the well not having been expressly devised, we cannot infer the way from the privilege, but must rather presume an extinguishment of the privilege unless the way may be otherwise implied. If the facts are not such that the way may be otherwise implied, the *primâ facie* right of the plaintiff to have his estate unencumbered by the way must prevail. We think the way cannot properly be implied from the facts which are stated. We therefore sustain the exceptions and grant the plaintiff a new trial.

Exceptions sustained.

After reading the above opinion one is impressed with the thought that there is much to be said in favor of the decision of the court below. It might well

be argued that as the use of the well was reserved equally for the benefit of all portions of the "homestead estate" at the time of the sale to Delany and the testator, during his ownership of both sections of land, having impressed upon the portion owned by the plaintiff a *quasi* servitude or easement, for real servitude or easement, of course, could not be, the land servient and dominan belonging to the same person, and tha fact being presumably known to the devisees, the son and the daughter of the testator probably his heirs, the land would naturally pass to the devisees, with the respective portions charged and benefited, as they were in the testator's lifetime; unless something should appear in the devise, manifesting the intention of the testator to change the character of the enjoyment of the land; and that the devise in fee simple is not enough *per se* to manifest such intention since the enjoyment of an estate in fee simple is by no means inconsistent with its enjoyment subject to an easement, and as the will is to be taken as a whole and the intention of the testator collected therefrom (3 Burr. 1541, 1581; *Ruston* v. *Ruston*, 2 Dall. 244), if the devise to plaintiff's grantor "gave the devisee as perfect an estate as the devisor himself had and that was an estate so unencumbered;" so the devise to the defendant gave her "as perfect an estate as the devisor himself had" and that was an estate with the advantage of the use of the well annexed thereto and solemnly reserved to it, and that as to the use of the well the way, long used by the testator, was necessary, as no presumption could be raised that the owner of the Delany lot would permit a new and more burdensome way to be laid out upon his premises—as he certainly could not be compelled to—the way having been once located, the power of location was gone for ever, and in this case, the effect would be not merely to change the way but to create an additional and distinct one.

The English authorities seem to uphold the decision and to show a tendency to restrain ways by implication to those of strict necessity (though occasionally straining the word "necessity" and sometimes taking a more liberal view as to the character of the necessity), and by no means to favor the granting of ways by implication as original rights, or their revival after extinction by unity of possession, and, in view of the assumed non-continuous character of ways, not to apply to that species of easements the rule laid down in Gale on Easements 40. "Easements which are apparent and continuous are not merely those which *must* necessarily be seen, but those which *may* be seen or known on a careful inspection by a person ordinarily conversant with the subject."

In *Whalley* v. *Thompson*, 1 B. & P. 371 (1799), it was held that a way extinguished by unity of possession did not revive on severance. In *Plant* v. *James*, 5 B. & Ad. 794 (1833), Lord DENMAN said, "If the grantor wishes to revive or create such a right he must do it by express words or introduce the words therein used and enjoyed "in which case easements existing in point of fact though not existing in point of law would be transferred to a grantee."

In *Glave* v. *Harding*, 27 L. J. (N. S.) Exch. 286 (1858), Baron BRAMWELL appears to be disposed to apply a somewhat more liberal rule to ways and to grant that there might be such a thing as a continuous way. "It [a lease] did not grant the right in terms and the only way in which it could grant it was that the condition of the premises, at the time when the lease was granted, showed that it was intended that the right of way should be exercised on the principle I have adverted to, that by the devolution of the tene-

ments a right of way to a particular door or gate would, as an apparent or continuous easement, pass to the owners and occupiers of both of them. But I think that the way in question is not a continuous and apparent easement within the principle of law * * * I found my opinion upon the condition of the premises at the time the lease was granted."

In most of the English cases, there were other outlets besides the one claimed as a way by implication and as reasonably necessary, and therefore they do not exactly cover the point of the principal case; indeed in *Pheysey* v. *Vicary*, 16 M. & W. 484, it was doubted by ALDERSON, B., whether a new trial should not be granted to try whether the way claimed were not necessary to the *convenient* occupation of the house, although there was another outlet from the premises. In *Dodd* v. *Burchell*, there was an additional way.

Necessity has in some cases been given a more liberal interpretation. In *Pyer* v. *Carter*, 1 H. & N. 972, it was said that by necessity should be understood the necessity at the time of conveyance and as matters then stood without alteration. This case which was not that of a way, has run the gauntlet of criticism and it is questionable how far it is authority beyond its own facts. In *Ewart* v. *Cochrane*, 7 Jur. 925 (1861), Lord CAMPBELL said: "When two properties are possessed by the same owner, and there has been a severance made of part from the other, anything which was used and was necessary for a comfortable enjoyment of that part of the property which is granted shall be considered to follow from the grant, if there be the usual words of conveyance."

Polden v. *Bastard*, 4 B. & S. 258, does not materially differ from the principal case, except perhaps in the particular, that in the English case, there was evidence that water could be obtained on the premises of the defendant by digging a well of a certain depth, but this distinction can be easily resolved to a mere question of the burden of proof, which Chief Justice DURFEE thinks should rest upon the person claiming the easement

In the United States, in Massachusetts, in the case of *Pettingill* v. *Porter*, 8 Allen 1 (1869), it was left to the jury to say whether there would be unreasonable labor and expense in constructing another way, and in the Supreme Court, CHAPMAN, J., said: "The word 'necessity' cannot reasonably be held to be limited to physical necessity. If it were so, the way in question would not pass with the land if another way could be made by any amount of labor or by any possibility."

In *Fetters* v. *Humphrey*, 3 C. E. Green (Ch.) 262 (1867), ZABRISKIE, Ch., remarked, "If until the time of severance of title there has been a way, or drain, or other matter in the nature of an easement, from one of the parcels through the other, established and kept up by the common owner of both, and necessary for the beneficial enjoyment of the dominant parcel, then an easement is created by such sale, devise or partition. Discontinuous easements not constantly apparent are only continued or created when they are necessary, and that necessity cannot be obviated by a substitute constructed on or over the dominant premises."

In Pennsylvania, the doctrine, which seems based rather in legal refinement than on practical utility, that ways are not continuous easements, and that, therefore, the same rule as to visibility and permanency, is not to be applied to them as to other easements, is not regarded as law, and more liberality has been shown in sustaining ways than elsewhere. In *Kieffer* v. *Imhoff*, 2 Casey 438 (1856), the right to an alley-way

through the servient in favor of the dominant portion of land, which two portions had formerly belonged to one proprietor and had been sold at sheriff's sale, with no mention of the right of way, was sustained, although it was not a way of necessity. LEWIS, C. J., said, "It is obvious, therefore, that if the dominant and servient tenements become the property of the same owner, the exercise of the right, which in other cases would be the subject of an easement, is during the continuance of his ownership, one of the ordinary rights of property only, which he may vary or determine at pleasure. The inferior right of easement is merged in the higher title of ownership: 2 Bing. 83; 9 Moore 166; 3 Bulst. 340. * * * Upon a subsequent severance of the estate by alienation of part of it, the alienee becomes entitled to all continuous and apparent easements which have been used by the owner, during the unity of the estate and without which the enjoyment of the several portions could not be fully had. * * * The owner may, undoubtedly, alter the quality of the several parts of his heritage, and if he does so and afterwards alien one part, it is but reasonable that the alterations thus made, if palpable and manifest and obviously permanent in their nature, shall go to the purchaser in the condition in which they were placed and with the qualities attached to them by the previous owner." The learned judge also approved of the rules of the civil law with reference to servitudes and cited Pardessus, *Traite des Servitudes*, § 288, which (as given in Gale, p. 50) is "If afterwards these heritages should become the property of different owners, whether by alienation or division amongst his heirs, the service which the one derived from the other and which was simple 'destination *du pue de famille*,' as long as the heritages belonged to the same owner, becomes a servitude as soon as they pass into the hands of different proprietors."

In *Phillips* v. *Phillips*, 12 Wright 186 (1864), THOMPSON, J., said: "In this, although we do not recognise a way of necessity, we see the reason for the creation of this private way (*i. e.*, that it was the only convenient way), why it was opened, kept open and used by the owner and his family until his death, and the same condition of things, as regards the surroundings continuing, we may presume that it must have been the intention of the owner that it should remain permanent, inasmuch as he made a final disposition by will of both the dominant and servient portions, without the slightest hint of a wish that their relations to each other should be changed." It will be noticed that the court gave a different face to the devise in fee from that given by the Rhode Island court, and as its opinion is derived from a consideration of the whole will, it would seem to be in better accord with the usually received principles of interpretation.

Pennsylvania Railroad Co. v. *Jones*, 14 Wright 417 (1865), recognises and follows the foregoing case.

In *Overdeer* v. *Updegraff*, 19 P. F. Smith 119 (1871), which was the case of an alley-way, WILLIAMS, J., said: "But if there had been no express reservation of the right to the use of the alley in the conditions of sale, and in the deed delivered to the purchaser, the latter would have taken it subject to the servitude imposed upon it by the decedent for the use and benefit of the occupants of the adjoining lot. It was a continuous and apparent easement and the law is well settled that in such a case a purchaser, whether at private or judicial sale, takes the property subject to the easement."

In *Cannon* v. *Boyd*, 23 P. F. Smith 179 (1873), where an alley-way was claimed over a property which had been sold at sheriff's sale, on behalf of a property sold at the same sale, both properties having belonged to the same owner, LYND, J., in the District Court,

had charged: "The only question in this case is, what was the condition of these two properties at the time of the sheriff's sale? If the condition of the properties was such as to indicate that the occupants of property now owned by the plaintiff used the alley in question and had a right to do so, the verdict should be for the plaintiff." This was affirmed by the Supreme Court.

It will be seen by this short review of cases that there is a considerable conflict of authority, leading to no little uncertainty, but that on the whole it can hardly be said of ways by implication that they are favorites of the common law. H. B., Jr.

Supreme Court of Michigan.

JOHN HANCOCK MUTUAL LIFE INS. CO. v. MOORE, Adm'r of TODD.

A party cannot be compelled to accept his adversary's admission in lieu of affirmative evidence offered by himself.

Where a paper is admissible for one purpose, it does not become inadmissible because it cannot be used for another. Thus where an administrator sues on a life insurance policy, his letters of administration are admissible in proof of his representative character, although they are not in such case evidence of the death of the insured.

Though there is no presumption of death from the fact of disappearance until after seven years, yet a jury may infer death at an earlier date from circumstances or any other satisfactory evidence.

A clause in a policy of life insurance that the policy shall be void if the assured die by his own hand, is in the nature of a penalty or forfeiture, and the burden is on the insurers to show that it has been incurred.

Such forfeiture is not incurred by self destruction while insane, and it makes no difference whether the language of the policy is "die by his own hand" or by "suicide." The terms are synonymous.

Where the jury find the fact of death of the assured, but in answer to special instructions to find whether or not he committed suicide, they return that they cannot say, this does not vitiate the verdict. A general verdict for the plaintiff would not be vitiated even by a finding that the assured committed suicide, unless the jury also find that it was voluntary.

Error to Wayne Circuit.

The suit below was on a life policy in favor of William Todd, who was claimed to be dead, but whose death was sought to be proved by his disappearance, aided by circumstantial testimony.

The defence relied on was, 1. That he was not shown to be dead; and 2. That if dead he died by his own act. The policy contained this clause: "3. That in case the person whose life is hereby insured shall die by his own hand," &c., "this policy shall be void, and the company shall not be liable for the loss."

Griffin and *Dickinson*, for plaintiff in error.

A. H. Wilkinson and *Hoyt Post*, for defendant in error.

The opinion of the court was delivered by

CAMPBELL, J.—An error is alleged on the reception in evidence of the letters of administration. Defendants below admitted their existence and the representative character of Mr. Moore, but objected to the admission of the letters themselves, because they were not evidence of the death of Todd. The court held they were not evidence of death, but admitted them in proof.

We do not quite comprehend the objection. A party can never be compelled to accept his adversary's admission in lieu of record evidence unless he chooses, and a paper which is admissible for one purpose does not become inadmissible because it cannot be used for another. The letters were proper to show the plaintiff's capacity, and could not be excluded on any theory. Whether they proved death was another matter, and in this case the court held they did not.

The same remark will apply to the proofs of death submitted to the company under the requirements of the policy. The admission that such proofs had been furnished did not render it improper to produce the documentary evidence, and prevented any subsequent disputes as to the meaning and extent of admissions.

And it would be difficult to see how a party can be damnified by proof which accords with his admissions.

The principal questions arise upon the rulings in the cause as it went to the jury.

The defendant below's first request was as follows: "That under the law there is no presumption of death until after a disappearance of seven years, and that the burden of proof is upon the plaintiff in this case to show the fact of death. That it is not incumbent upon the insurance company to show that the insured it not dead, until after the lapse of seven years from date of disappearance."

This the court gave; but stated to the jury in substance that death might be shown otherwise than by the production of an eyewitness to the act, and might be shown by satisfactory circumstances.

This was unquestionably correct. There is no doctrine which, in civil cases, requires death to be proved by any more conclusive or peculiar evidence than any other fact material to recovery in an

action. If the testimony satisfies the court or jury passing on facts, and is reasonably sufficient, and compels belief, the conclusion is certainly lawful.

Upon the rulings of the court upon the second, third and fourth requests of defendant below no exception was taken. They were substantially granted, and related to the necessity of diligent search and inquiry after the missing man, and the question of suicide and the presumption of sanity.

Three requests were refused, which were, 5. That there was no evidence of Todd's insanity at the time of his disappearance; 6. That there was no evidence of his death; and, 7. That under the evidence plaintiff could not recover.

The evidence tended to show that Todd had been, for a considerable time, laboring under a very severe and dangerous disease of the brain and spine, which in the opinion of his physician must have proved fatal in a short time, and most probably have rendered him insane. There was evidence of its effect on his feelings and conduct, indicating that his mind was affected by the disease. The testimony was such as to have a decided bearing on the question of his sanity, and it was for the jury to pass upon it. It is not for us to review their finding, if there was evidence before them to be acted on. We have no means of knowing what they thought of it, as they have not found specially on the subject.

As to the fact of death, we think there was not only competent evidence, but such as they were fully justified in accepting as complete. A sudden disappearance, and the failure to discover any traces of a man who, if living, could not easily have gone unnoticed, and who was in such a physical and mental condition as to excite the anxiety of his friends upon this very subject, cannot be said to afford no evidence tending to prove his death. The instructions of the court as to the diligence needed for a search after him, were full and correct. The assiduity of friends in pursuing the inquiry was great and constant. We think the jury had enough to act upon.

They found a general verdict for the plaintiff. They were asked to find whether Todd committed suicide, and answered they could not say. It is claimed this vitiated their verdict.

Plaintiffs in error insist that the burden of proof is on the administrator to prove that Todd did not die by his own hand, and

also that if he did so, the policy is void whether he was sane or insane.

The condition which makes the policy void in case of such a death is in the nature of a penalty or forfeiture, and the burden is on the insurers to show it, and not on the insured to negative it. There can be no presumption of wrongdoing without proof, and the insured is not bound to show that his intestate had done no act to destroy an existing right in the policy. This would be to reverse the burden of proof generally adopted. Usually, where the death is proved by eye-witnesses the circumstances are such that the order of proof becomes less material, and the facts connected with the death may be so peculiar as to need explaining. Of course if the plaintiff suing upon a policy throws doubt over his own case, or if his witnesses by their examination and cross-examination leave his case imperfect, he must clear it up or be defeated. But when all the testimony on both sides is in, any inference which will lead to a forfeiture can only be properly drawn from a preponderance of proof that the forfeiture has been incurred.

The forfeiture in this case was to arise if the insured died by his own hand. Some stress is laid on the term "suicide," as if it means a wrongful act, or self-murder. It has no such restricted meaning. It means self-killing, just as "homicide" means killing any one else. But there may be excusable homicide as well as felonious, and suicide was only cognizable at law when the person was *felo de se*, or guilty of a felonious act. If *non compos mentis*, the actor in homicide or suicide commits no crime. In one sense a man dies by his own hand who kills himself, whether sound or frenzied. But the condition in this policy cannot be construed to cause a forfeiture for acts involving no evil will. The clause punishing the insured for self-slaughter is a penal clause in the strictest sense of the term, and embraces several other acts in the same penalty, all of which involve voluntary wrongdoing. They are, death by duelling, or by the hands of justice, or in the violation of the laws, or impairing health by vice or intemperance. When an act which is to cause forfeiture is classed among such wrongful conduct, it is fairly to be inferred that it is regarded as *ejusdem generis*, and depending on the same reasons.

A construction which punishes a person who is not in fault is not to be favored, if it can be allowed at all. The very object of

life insurance is to provide for death by disease or in the ordinary course of nature. Death by his own hands, in the case of one *non compos* is as much the result of disease as death by fever or consumption. The act of an insane man is morally no more his act than if it were mechanical.

We do not think it profitable to discuss the subject at large. The authorities differ somewhat, but we do not think there is any such preponderance of good sense in those decisions which treat an insane person like one in his senses, that we care to follow them.

A finding of suicide, without a further finding that it was voluntary, would not conflict with the general verdict, and would be immaterial.

There is no error in the judgment, and it must be affirmed with costs.

The foregoing case treats of many important branches of the law of insurance. It is not proposed to discuss all of them, but to submit some remarks respecting one or two only.

I. The first matter referred to, viz.: the admissibility of letters of administration to prove death, although not principally in question, deserves notice on account of its importance, and the absence, perhaps, of final authority settling it.

The grant of letters of administration by a probate court is regarded in the law as a judgment. But if *in personam*, it is clearly no judgment to which the insurer of the decedent's life is a party, or even a privy, and therefore, according to the familiar rule, does not bind him. The courts, however, regard it as a judgment *in rem*, not *in personam*, and inconsistent decisions have been made in the attempt to apply the rule that a judgment *in rem* binds all the world.

In the notes to the *Duchess of Kingston's Case*, 2 Smith's Lead. Cas. 622, it is laid down that "the universal effect of a judgment *in rem* depends, it is submitted, on this principle, viz.: that it is a solemn declaration, proceeding from an accredited quarter, concerning the status of the thing adjudicated upon, and *ipso facto* renders it such as it is thereby declared to be."

If the court has jurisdiction, the decision upon the *status* of the thing is final. But what is *status?* There is a *status* of things, and a *status* of men. The word is not only of Roman origin, but means a thing known to the Roman law, derived by us from those English courts where the civil law is the basis of the ecclesiastical. In the Digest (IV. 5, 11) we read that the *status* of men is composed of three heads: 1. Liberty; 2. Citizenship; 3. Family. Each of these three heads is a thing, and an adjudication as to the *status* of the thing, is, properly speaking, a judgment *in rem*. For example, a husband applies for administration upon his deceased wife's property; the court decides that his family *status* entitles him to the letters, and so awards them. True, the judgment relates in a measure to the rights of a person, but so must every judgment, more or less, and if the intervention of a personal right is to make a judgment one *in personam*, obviously the distinction is annihilated. Now the adjudication being essentially as to the *status* of the applicant, it may readily have conceded to it all the validity it requires,

and while in another court the grounds on which it proceeds may not be controverted in order to impeach the result, so, too, by a parity of reason, is the effect of those grounds limited to the proof of the result. No authority will then be demanded to satisfy the mind that because the Probate Court decides that the wife is dead, and therefore the husband being so entitled, may not in another court, prove his wife's death by proof of his own *status*.

These views are in entire conformity with the opinion of the judges in the *Duchess of Kingston's Case*, *supra*, and the learned notes of the editors, and perhaps the reader will have already deduced them for himself. The apology is, that if courts of justice and learned writers like Greenleaf (Ev. 1, sect. 550), can hold the opposite opinion, it is not useless to combat it.

It is not enough to argue that if the letters should not be proof, yet they should be evidence, for any evidence may be held sufficient in a given case, and so amount to proof.

The decision which is probably the latest, as it is certainly the most authoritative, is that of *Insurance Co.* v. *Tisdale*, 15 Am. Law Reg. N. S. 412, where the Supreme Court of the United States held that in an action on a policy by a wife in whose favor it had been issued, the fact of letters of administration having been granted to the plaintiff was no evidence of the death of the assured. The fact that the letters had been granted to the plaintiff, of course made no difference, for the suit was in her individual capacity as beneficiary. Judge HUNT in his opinion cites numerous cases where the decisions were very analogous in principle, as well as many where the facts were similar. The case will well repay perusal, and go far to settle the law upon the subject. A very interesting discussion also upon the effect of a judgment of a probate court will be found in *Roderigas* v. *East River Saving Institution*, 15 Am. Law Reg. N. S. 205, and Judge REDFIELD'S note.

II. Another matter of great importance is the effect of clauses in policies stipulating against suicide, and their effect when suicide is committed in a state of insanity. The subject is one which is literally unsettled by the cases, and their name is legion. An extended review of them is unnecessary, because Mr. Bigelow, in his Insurance Cases, has exhibited a panorama, not to say a menagerie, of text and notes, in which, in the language of Lord ELDON, referring to the cases on the rule in *Shelley's Case*, 2 Bligh 50, "the mind is overwhelmed by their multitude and the subtlety of the distinction between them."

The question in the cases is the proper construction of the written contracts made by the parties, together, of course, with its application to the facts proved on the trial, or admitted in the pleadings. No one doubts that the contract of insurance should be construed like any other contract, but, it is submitted, one may fairly doubt whether the usual construction put upon the clause is correct. The courts generally, if not always, regard the clause as providing for a forfeiture, and the law generally, if not always, abhors a forfeiture, just as nature used to abhor a vacuum before the time of Newton. The words in which the condition, as it is called, is expressed are not uniform; but take a common form, "provided that if the assured shall commit suicide," &c.; that does not necessarily import a condition. It is sometimes loosely said that the term "provided that" or "proviso" creates a condition; to such as say so a diligent perusal of *Lord Cromwell's Case*, 2 Coke R. 69 a, is recommended. It would be well to read it as we are advised to read Littleton, viz., by meditation on every sentence, as thereby it is confidently predicted the reader will find many things of value.

It will there be found that the term may indicate a covenant, and even that it may be used merely as a limitation. In other words, it is not to be construed to defeat the parties' intention, but to aid it, just as Lord HARDWICKE declared that the Statute of Frauds was not meant to advance fraud but to suppress it.

In the construction of contracts regard should be had to notorious facts existing at the time of inception. Now what more notorious than this: that all calculations as to the probable duration of a man's life are based upon experience of the ordinary course of nature in its broadest sense, *i. e.*, the *non ego*, and that any extraordinary, unnatural phenomenon will render them worse than useless? History, we are told by high authority, can never be a science; we will never be able to predict the future with scientific certainty, because the future will be what man's free will makes it, and who can tell what motives will exist, and how they will affect their subject? Mr. Buckle may answer this, but Mr. Buckle is not yet universally recognised as being all he professes, and authority and reason, those two faithful witnesses, as COKE calls them, have not approved his doctrines. Now supply a man already endowed with the power to do (for our purposes) as he likes, with a powerful motive, sane or insane, to put an immediate end to his life, and who can tell how long he will live, or what premium to charge? No disciple of the philosopher just named would invest his money in insurance stock if it was liable in all cases of suicide. His doctrines would be found "inapplicable" to the question in all probability, and a change very speedily recommended.

Is it not probable that contracts of insurance on life are made with reference to this general belief? It is not unreasonable to interpret the contract to mean this. That the man is insured against death by the ordinary course of things, *i. e.*, disease or casualties happening through no fault of his own, that is to say, the general words of assurance are restricted by the proviso, which defines the limits of the contract, instead of seeking to divest a right in the contingency of the insured breaking a condition.

It is not always that such a construction might be consistent with the words of the policy, and others may not be drawn artistically, but we may still yield something *propter simplicitatem laicorum* and not uproot the principles of construction.

If the construction suggested be accepted, then voluntary killing of one's self, sane or insane, death by the hands of justice for a crime voluntarily committed (for there must be the willing mind), death in a duel to which the insured voluntarily submitted, would be cases for which there was never an intention to insure; never an *aggregatio mentium*, never, therefore, any contract at all: *Kingsford* v. *Merry*, 1 H. & N. 503; *Deccan* v. *Shippen*, 11 Casey 239.

If the construction be accepted then the law would be simple, and the question always one of fact. Did the insured voluntarily cause his own death, if so, the insurer is not liable, if not he is. And an approach seemed to be made to this in the two English cases usually termed the leading ones: *Borrodaile* v. *Hunter*, 5 M. & G. 639, and *Clift* v. *Schwabe*, 3 M., G. & S. 437. In both cases the assured, being more or less insane at the time, voluntarily killed himself; and in both cases it was held that the insurer was not liable. The later decision of Vice Chancellor WOOD in *Horn* v. *Insurance Co.*, 30 Law J. (Chanc.) 511, is not inconsistent because there was in the policy in that case no provision on the subject. The learned judge held that suicide, in a state of temporary insanity, was not a legal offence, and the contract would

not be void on grounds of public policy, and therefore was valid, and in that he was doubtless right, for the words of assurance were general and unrestricted.

As to the equivalence of "suicide" and "die by his own hand" no remarks are intended to be made. If courts will pursue the beaten track of construction, it appears hopeless to begin a definition of the words that will give them trouble, and so too of the burden of proof as to the case being within an exception to the policy; that is only one of many questions the occurrence of which is believed to be in great measure factitious and unnecessary.

Mr. Bigelow in his note to *Borrodaile* v. *Hunter*, 2 Ins. Cas. 304, concludes that "the weight of American authority seems decidedly in favor of the rule in *Dean* v. *American Life Ins. Co.*, 4 Allen 96, that a life policy, with a condition against suicide, is only avoided when the act, in a case of insanity, is committed intentionally, and with full knowledge of its nature and consequences."

The subject, however, notwithstanding this opinion, is not and cannot be called settled even by weight of authority, so long as courts of undoubted reputation differ, and as the Supreme Court of the United States has no authority to settle the question for the whole country, its decision in *Insurance Co.* v. *Terry*, 15 Wall. 580, will hardly induce other courts to overrule their own decisions, even if they admire the other. In *Terry's Case* the act of suicide was committed during insanity. The court not only held that the provision "die by his own hand" was inapplicable, but that even if the act was voluntary there could still be a recovery, as the insured's reasoning powers were so far impaired that he did not understand the moral character of the act, &c. It would furnish an interesting labor to some gentleman of leisure to go carefully through the reports and ascertain exactly how many decisions were approved, affirmed, disapproved, doubted and criticised in this case, whether mentioned by name or not.

No one can estimate the loss to the community in the great uncertainty that prevails, the great loss by litigation, the great mass of litigation itself, by reason of the uncertainty and the refined distinctions with which the books abound, making each litigant hope that his case will not be governed by such and such a one, because there are minor points of difference.

It is probable, however, that the difficulties and discrepancies on this point will be gradually removed by the general adoption by insurance companies of a clause in their policies relieving them from liability where the assured dies by his own hand, whether sane or insane. Such a condition was sustained in *Pierce* v. *Traveller's Life Ins. Co.*, 34 Wis. 389, where it was said by Chief Justice DIXON that the plain meaning of these words was to include every kind of *intentional* self-destruction, without reference to the moral responsibility of the person.

This decision has been quoted approvingly, and followed by the Supreme Court of the United States at the present term, in *Bigelow, Adm'x*, v. *The Berkshire Life Ins. Co.* The policy in that case contained a condition in avoidance if the insured should die by suicide, *sane or insane*. The defendant pleaded that the insured died from a pistol shot wound inflicted by himself with intent to destroy his life. To this the plaintiff replied, that the insured at the time when he fired the shot was of unsound mind and wholly unconscious of the act. To this replication defendant demurred, and the demurrer was sustained by the court below. The decision was affirmed by the Supreme Court, DAVIS, J., delivering the opinion, in which he

maintained the substantial identity of the phrases "suicide" and "death by his own hand," as previously decided in *Ins. Co.* v. *Terry*, 15 Wall. 580, and held that the plain import and purpose of the introduction of the clause in question were, because the line between sanity and insanity is often shadowy and difficult to define, to take the subject from the domain of controversy and by stipulation exclude all liability by reason of the death of the party by his own act whether he was at the time a responsible moral agent or not. "Nothing can be clearer," says the learned judge, "than that the words sane or insane were introduced for the purpose of excepting from the operation of the policy any intended self-destruction, whether the insured was of sound mind or in a state of insanity. These words have a precise, definite, well-understood meaning. * * * It is unnecessary to discuss the various phases of insanity in order to see whether a possible state of circumstances might not arise which would defeat the condition. It will be time to decide this question when such a case is presented. For the purposes of this suit it is enough to say that if the assured was conscious of the physical nature of the act he was committing, and intended by it to cause his death, the policy is avoided, although at the time he was incapable of judging between right and wrong and did not understand the moral consequences of what he was doing. Any other construction would deny to the insurance companies the right to declare the sense in which they used words of limitation in their policies."

The general adoption of this clause by insurers, and a similar construction of it by the courts, would seem to open a way to uniformity in the rules of law upon this increasingly important subject; a most desirable result, which, except in some such mode, would seem to be at present almost beyond hope of attainment.

C. H. H.

Supreme Court of Minnesota.

THE STATE EX REL. BAXTER *v.* L. M. BROWN.

A day, in its ordinary meaning, is the space of twenty-four hours from midnight to midnight.

Where a constitution provides for an election to fill a vacancy in the office of judge "at the first election that occurs more than thirty days after the vacancy shall have happened," the word "days" must be taken to be used in its ordinary meaning; and therefore neither the day on which the vacancy happens nor the day of the election can be included in computing the time.

QUO WARRANTO. ANDREW G. CHATFIELD, judge of the Eighth Circuit, died October 3d 1875, and on October 27th the respondent was appointed to the vacancy thus caused, and entered on the duties of the office. At the general election, held November 2d 1875, the relator, Luther L. Baxter, was elected to the office of judge of the Eighth Circuit, and was duly qualified, but the respondent claiming to hold and exercise the office, this proceeding

was instituted to determine the title of the respective parties. To the petition setting forth the foregoing facts, the respondent demurred.

Sect. 10, Art. VI. of the Constitution of Minnesota, provides that: "In case the office of any judge shall become vacant before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is entitled and qualified. And such successor shall be elected at the first annual election that occurs more than thirty days after the vacancy shall have happened."

The opinion of the court was delivered by

BERRY, J.—The determination of the present controversy depends upon the meaning to be attributed to the words "more than thirty days after the vacancy shall have happened."

A day is the space of twenty-four hours from midnight to midnight. This is the ordinary and popular meaning of the word, and therefore, primâ facie, the sense in which it must be taken to have been used in our state constitution, which, as it was made by the people, should be understood as they understood it. Applying this definition to the constitutional provision in hand, it follows that neither the 3d day of October (the date of Judge CHATFIELD'S death), nor the 2d day of November (the date of the election), can be counted as one of the thirty days mentioned in the constitution. Neither that portion of October 3d which remained after the hour of Judge CHATFIELD'S death, nor that part of November 2d which preceded the hour of opening or closing the polls, was a space of twenty-four hours from midnight to midnight.

Neither could a space of twenty-four hours from midnight to midnight be made up by putting the fraction of October 3d and that of November 2d together.

This construction necessarily leads to the conclusion that the election of the relator, L. L. Baxter, is void. This conclusion is, we think, sustained by a consideration of the object of the constitutional provision in question. While the general purpose of the constitution is to make judicial offices elective, this purpose is qualified by the provisions of section 10. As a part of qualification the last sentence of the section is evidently inserted in appreciation of the great importance of judicial offices, and of the consequent necessity that the electors, before being called upon to fill

them, shall have such time for inquiry and consideration as will enable them to act with reasonable prudence and good sense in the premises.

The evil sought to be provided against was therefore such as would result from an election occurring *too soon* after the happening of a vacancy, rather than such as would follow from deferring an election too long.

If, as respects the question of computation of time, the language of the constitution were *per se* so ambiguous as to admit of two constructions equally plausible, it is upon the foregoing considerations clear that the construction should be adopted which will beyond an peradventure accomplish this purpose of the constitution.

This will require the construction which would give the electors the longest time for deliberation, that is to say, which would give them thirty clear days between the day when the vacancy happened and the day of the election.

This construction has the further advantage of relieving cases of this kind from the obvious practical difficulties and embarrassments which not unfrequently might arise if it were held to be either necessary or proper to take into consideration fractions of a day, in computing the thirty days required by the constitution.

It follows from the foregoing views that the respondent is entitled to the office of judge of the Eighth Judicial District.

Judgment for the respondent on the demurrer.

Some of the expressions of the learned judge in the foregoing opinion, especially his definition of a day as "the space of twenty-four hours from midnight to midnight," appear at first sight as contrary to the common-law rule that in legal computation there are no fractions of a day. Something, however, may be conceded to the liberality of construction always accorded to constitutional provisions. Thus in the *Opinion of the Supreme Court of New Hampshire*, on the Soldier's Voting Bill, 4 Am. Law Reg. N. S. 212, it was held that the days given by the constitution to the governor to return bills to the legislature without his approval are days of twenty-four hours each, and a veto would be in time if delivered to the speaker on the last day, though after the legislative day had ended and the legislature adjourned.

The cases on the subject of the computation of time, with reference to including or excluding the day of a date or of an act done, are collected in the note to the *Opinion, &c.*, 4 Am. Law Reg. N. S. 222; and, after careful examination of the very conflicting decisions, both in England and in this country, the conclusion is arrived at that the better rule is to exclude from the computation the day of the act done.

The same subject, with special reference to the mode of counting the last day when it falls upon Sunday, is also

learnedly discussed in Mr. Marr's note to *Citizen's Bank* v. *Ober*, 10 Am. Law Reg. N. S. 44, in which the same conclusion is reached, that the day of the act done, as the starting point of the computation, should be excluded. It may indeed be said that although the decisions are still conflicting and the subject not free from doubt, yet the tendency of the later cases is clearly towards the rule already indicated, as more in accordance with reason and justice in the majority of cases, more in accordance with the settled rules of the commercial law and therefore tending to uniformity, and as affording a convenient practical rule easily applicable and free from refinements and disputes about the special circumstances of each case.

Applying this rule in the principal case and excluding October 3d as the day on which the vacancy occurred, November 2d was only the thirtieth day, and therefore the election was not *more than thirty days* after the vacancy as required by the constitution. The plain intent of that provision was, as is said by the learned judge, "to give the electors thirty *clear days* between the day when the vacancy happened and the day of the election." The case therefore was well decided on this ground without the necessity of resorting to the construction that requires a day to be necessarily of twenty-four hours from midnight to midnight; a construction that might in some cases be extremely inconvenient.

J.

Supreme Court of the United States.

RICHARD WINDSOR *v.* WILLIAM N. McVEIGH.

A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.

The jurisdiction acquired by the seizure of property in a proceeding *in rem* for its condemnation for alleged forfeiture is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges for which the forfeiture is claimed. To that end some notification of the proceedings, beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential.

In proceedings before the District Court in a confiscation case, monition and notice were issued and published, but the appearance of the owner, for which they called, when made was stricken out, his right to appear being denied by the court. *Held*, that the subsequent sentence of confiscation of his property was as inoperative upon his rights as though no monition or notice had ever been issued. The legal effect of striking out his appearance was to recall the monition and notice as to him.

The doctrine that where a court has once acquired jurisdiction it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend in the extent or character of its judgment the law which is applicable to it.

ERROR to the Corporation Court of Alexandria, Virginia.

This was an action of ejectment to recover certain real property in the city of Alexandria. It was brought in the Corporation Court of that city, and a writ of error from the Court of Appeals of the state to review the judgment obtained having been refused, the case was brought here directly by a writ of error from this court.

The plaintiff in the Corporation Court proved title in himself to the premises in controversy, and consequent right to their immediate possession, unless his life estate in them had been divested by a sale under a decree of condemnation, rendered in March 1864, by the District Court of the United States for the Eastern District of Virginia, upon proceedings for their confiscation. The defendant relied upon the deed to his grantor executed by the Marshal of the District upon such sale.

The proceedings mentioned were instituted under the Act of Congress of July 17th 1862, "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes."

In July 1863, the premises in controversy were seized by the Marshal of the District, by order of the District-Attorney, acting under instructions from the Attorney-General. In August following, a libel of information against the property was filed in the name of the United States, setting forth that the plaintiff in this case was the owner of the property in question; that he had, since the passage of the above act, held an office of honor and trust under the government of the so-called Confederate States, and, in various ways, had given aid and comfort to the rebellion; that the property had been seized in pursuance of the act, in compliance with instructions from the Attorney-General, and, by reason of the premises, was forfeited to the United States, and should be condemned. It closed with a prayer, that process of monition might issue against the owner or owners of the property, and all persons interested or claiming an interest therein, warning them at some early day "to appear and answer" the libel; and as the owner of the property was a non-resident and absent, that an order of publication, in the usual form, be also made. Upon this libel the district judge ordered process of monition to issue as prayed, and designated a day and place for the trial of the cause, and that notice of the same, with the substance of the libel, should be

given by publication in a newspaper of the city, and by posting at the door of the court-house. The process of monition and notice were accordingly issued and published. Both described the land and mentioned its seizure, and named the day and place fixed for the trial. The monition stated, that at the trial all persons interested in the land, or claiming an interest, might "appear and make their allegations in that behalf." The notice warned all persons to appear at the trial "to show cause why condemnation should not be decreed and to intervene for their interest."

The owner of the property, in response to the monition and notice, appeared by counsel, and filed a claim to the property and an answer to the libel. Subsequently, on the 10th of March 1864, the District-Attorney moved that the claim and answer, and the appearance of the respondent by counsel, be stricken from the files, on the ground that it appeared from his answer that he was at the time of filing the same a "resident within the city of Richmond, within the Confederate lines, and a rebel." On the same day the motion was granted, and the claim and answer ordered to be stricken from the files. The appearance of the respondent was by his answer. The court immediately entered its sentence and decree, condemning the property as forfeited to the United States, reciting that the usual proclamation having been made, the default of all persons had been duly entered. The decree ordered the issue of a *venditioni exponas* for the sale of the property, returnable on the 16th day of the following April. At the sale under this writ, the grantor of the defendant became the purchaser.

The opinion of the court was delivered by

FIELD, J.—The authority for a writ of error directly to the inferior court will be found in *Gregory* v. *McVeigh*, 23 Wall. 294. The question for determination is whether the decree of condemnation, rendered without allowing the owner of the property to appear in response to the monition, interpose his claim for the property and answer the libel, was of any validity. In other words, the question is whether the property of the plaintiff could be forfeited by the sentence of the court in a judicial proceeding to which he was not allowed to appear and make answer to the charges against him, upon the allegation of which the forfeiture was demanded.

There were several libels of information filed against the pro-

perty of the plaintiff at the same time with the one here mentioned. They were identical in their allegations, except as to the property seized, and the same motion to strike from the files the appearance, claim and answer of the respondent was made in each case, and on the same day, and similar orders were entered, and like decrees of condemnation. One of these was brought here, and is reported in 11 Wallace. In delivering the unanimous opinion of this court, upon reversing the decree in the case, and referring to the order striking out the claim and answer, Mr. Justice SWAYNE said: "The order in effect denied the respondent a hearing. It is alleged he was in the position of an alien enemy, and could have no *locus standi* in that forum. If assailed there he could defend there. The liability and right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact, and of the right administration of justice:" 11 Wall. 267.

The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognised as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his case, and is not entitled to respect in any other tribunal.

That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to a notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, appear and you shall be heard, and when he has appeared, saying your appearance shall not be recognised, and you shall not

be heard. In the present case, the District Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence.

The law is and always has been that, whenever notice or citation is required, the party cited has the right to appear and be heard, and when the latter is denied the former is ineffectual for any purpose. The denial to a party in such a case of the right to appear is in legal effect the recall of the citation to him. The period within which the appearance must be made and the right to be heard exercised, is, of course, a matter of regulation depending either upon positive law, or the rules or orders of the court, or the established practice in such cases. And if the appearance be not made, and the right to be heard be not exercised within the period thus prescribed, the default of the party prosecuted, or possible claimants of the property, may of course be entered, and the allegations of the libel be taken as true for the purpose of the proceeding. But the denial of the right to appear and be heard at all is a different matter altogether.

The position of the defendant's counsel is that, as the proceeding for the confiscation of the property was one *in rem*, the court, by seizure of the property, acquired jurisdiction to determine its liability to forfeiture, and consequently had a right to decide all questions subsequently arising in the progress of the cause, and its decree, however erroneous, cannot therefore be collaterally assailed. In supposed support of this position opinions of this court in several cases are cited, where similar language is used respecting the power of a court to pass upon questions arising after jurisdiction has attached. But the preliminary proposition of the counsel is not correct. The jurisdiction acquired by the court by seizure of the *res* was not to condemn the property without further proceedings. The physical seizure did not of itself establish the allegations of the libel, and could not, therefore, authorize the immediate forfeiture of the property seized. A sentence rendered simply from the fact of seizure would not be a judicial determination of the question of forfeiture, but a mere arbitrary edict of the judicial officer. The seizure in a suit *in rem* only brings the property seized within the custody of the court, and informs the

owner of that fact. The theory of the law is that all property is in the possession of its owner in person or by agent, and that its seizure will, therefore, operate to impart notice to him. Where notice is thus given the owner has the right to appear and be heard respecting the charges for which the forfeiture is claimed. The right must be recognised and its exercise allowed before the court can proceed beyond the seizure to judgment. The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon the question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges. To this end some notification of the proceedings, beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential. Such notification is usually given by monition, public proclamation or publication in some other form. The manner of the notification is immaterial, but the notification itself is indispensable.

These views find corroboration in the opinion of Mr. Justice STORY, in the case of *Bradstreet* v. *The Neptune Insurance Co.*, 3 Sumner 601. In that case the action was upon a policy of insurance upon a vessel, the declaration alleging its loss by seizure of the Mexican government. The defendants admitted the seizure, but averred that it was made, and that the vessel was condemned for violation of the revenue laws of Mexico, and to prove the averment, produced a transcript of the record of the proceedings of the Mexican court againt the vessel, and of the decree of condemnation. Among the questions considered by the court was the effect of that record as proof of the laws of Mexico, and of the jurisdiction of the court and the cause of seizure and condemnation. After stating that the sentence of a foreign court of admiralty and prize *in rem* was in general conclusive, not only in respect to the parties in interest, but also for collateral purposes and in collateral suits, as to the direct matter of title and property in judgment, and as to the facts on which the tribunal professed to proceed, Mr. Justice STORY said, that it did not strike him that any sound distinction could be made between a sentence pronounced *in rem* by a court of admiralty and prize, and a like sentence pronounced by a municipal court upon a seizure or other proceeding *in rem*, that in each the sentence was conclusive as to the title and property, and it seemed to him was equally conclusive as to the facts on which the sentence professed to be founded. But the

learned judge added, that it was an essential ingredient in every case, when such effect was sought to be given to the sentence, that there should have been proper judicial proceedings upon which to found the decree, that is, that there should have been some certain written allegations of the offence, or statement of the charge for which the seizure was made, and upon which the forfeiture was sought to be enforced; and that there should be some personal or public notice of the proceedings, so that the parties in interest, or their representatives or agents, might know what the offence was with which they were charged, and might have an opportunity to defend themselves and to disprove the same. "It is a rule," said the learned judge, "founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his defence before his property is condemned, and that charges on which the condemnation is sought shall be specific, determinate and clear. If a seizure is made and condemnation is passed without the allegation of any specific cause of forfeiture or offence, and without any public notice of the proceedings, so that the parties in interest have no opportunity of appearing and making a defence, the sentence is not so much a judicial sentence as an arbitrary sovereign edict. It has none of the elements of a judicial proceeding, and deserves not the respect of any foreign nation. It ought to have no intrinsic credit given to it, either for its justice or for its truth, by any foreign tribunal. It amounts to little more, in common sense and common honesty, than the sentence of the tribunal which first punishes and then hears the party—*castigat, auditque.* It may be binding upon the subjects of that particular nation, but upon the eternal principles of justice it ought to have no binding obligation upon the rights or property of the subjects of other nations, for it tramples under foot all the doctrines of international law, and is but a solemn fraud if it is clothed with all the forms of a judicial proceeding."

In another part of the same opinion the judge characterized such sentences "as mere mockeries, and as in no just sense judicial proceedings," and declared that they "ought to be deemed both *ex directo in rem* and collaterally, to be mere arbitrary edicts or substantial frauds."

This language, it is true, is used with respect to proceedings *in rem* of a foreign court, but it is equally applicable and pertinent to proceedings *in rem* of a domestic court, when they are taken

without any monition or public notice to the parties. In *Woodruff* v. *Taylor*, 20 Vermont 65, the subject of proceedings *in rem* in our courts is elaborately considered by the Supreme Court of Vermont. After stating that in such cases notice is given to the whole world, but that from its nature it is to the greater part of the world constructive only, and mentioning the manner in which such notice is given in cases of seizure for violation of the revenue laws, by publication of the substance of the libel, with the order of the court thereon, specifying the time and place of trial, and by proclamation for all persons interested to appear and contest the forfeiture claimed, the court observed that, in every court and in all countries where judgments are respected, notice of some kind was given, and that it was just as material to the validity of a judgment *in rem* that constructive notice at least should appear to have been given as that actual notice should appear before the record of a judgment *in personam*. "A proceeding," continued the court, "professing to determine the right of property, where no notice, written or constructive, is given, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding. It would be a mere arbitrary edict, not to be regarded anywhere as the judgment of a court."

In the proceeding before the District Court in the confiscation case, monition and notice, as already stated, were issued and published, but the appearance of the owner, for which they called, having been refused, the subsequent sentence of confiscation of his property was as inoperative upon his rights as though no monition or notice had ever been issued. The legal effect of striking out his appearance was to recall the monition and notice as to him. His position with reference to subsequent proceedings was then not unlike that of a party in a personal action after the service made upon him has been set aside. A service set aside is never service by which a judgment in the action can be upheld.

The doctrine invoked by counsel that where a court has once acquired jurisdiction it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil or criminal; or to particular modes

of administering relief, such as legal or equitable; or to transactions of a special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of these judgments. *Norton* v. *Meador*, Circuit Court for California. Though the court may possess jurisdiction of a cause, of the subject-matter and of the parties, it is still limited in its modes of procedure and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous, they would be absolutely void, because the court in rendering them would transcend the limits of its authority in those cases. See the language of Mr. Justice MILLER, to the same purport, in the case of *Ex parte Lange*, 18 Wall. 163. So it was held by this court in *Bigelow* v. *Forrest*, 9 Wall. 351, that a judgment in a confiscation case condemning the fee of the property was void for the remainder, after the termination of the life estate of the owner. To the objection that the decree was conclusive that the entire fee was confiscated, Mr. Justice STRONG, speaking the unanimous opinion of the court, replied: "Doubtless a decree of a court having jurisdiction to make the decree, cannot be impeached collaterally; but under the Act of Congress the District Court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest, the owner. Had it done so, it would have transcended its jurisdiction." 9 Wall. 350.

So a departure from established modes of procedure will often render the judgment void: thus the sentence of a person charged with felony, upon conviction by the court, without the intervention of a jury, would be invalid for any purpose. The decree of a court

of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the chancellor; and the reason is that the courts are not authorized to exert their power in that way.

The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend in the extent or character of its judgment the law which is applicable to it. The statement of the doctrine by Mr. Justice SWAYNE in the case of *Cornell* v. *Williams*, 20 Wall. 250, is more accurate. "The jurisdiction," says the justice, "having attached in the case, everything done *within the power of that jurisdiction*, when collaterally questioned, is held conclusive of the rights of the parties, unless impeached for fraud."

It is not within the power of the jurisdiction of the District Court to proceed with the case, so as to affect the rights of the owner after his appearance had been stricken out, and the benefit of the citation to him thus denied. For jurisdiction is the right to hear and determine, not to determine without hearing. And where, as in that case, no appearance was allowed, there could be no hearing or opportunity of being heard, and therefore could be no exercise of jurisdiction. By the act of the court, the respondent was excluded from its jurisdiction.

The judgment of the Corporation Court is affirmed.

Supreme Court of Indiana.

STATE OF INDIANA v. HENRY THROCKMORTON.

There may be an unlawful intention to kill and yet the killing be only manslaughter, if it be without malice, as e. g., upon sudden heat or quarrel.

Therefore, an indictment for assault and battery with intent to commit manslaughter, is good.

Where a statute provides that upon an indictment for an offence, consisting of different degrees, the jury may find the defendant not guilty of the degree charged, but guilty of any degree inferior thereto; the jury, upon an indictment for assault and battery with intent to murder, may find a verdict of guilty of assault and battery with intent to commit manslaughter. Therefore, where an indictment charged in the first count an assault with intent to murder, and in the second, an assault with intent to commit manslaughter, and the court on motion quashed the second

count, on the ground that there was no such crime as an assault with intent to commit manslaughter, it was *held*, that although it was error to quash the second count, yet as the defendant might have been convicted of the offence therein charged under the first count, the judgment would not be reversed.

APPEAL from the Allen County Criminal Court.

Throckmorton, the appellee, was indicted for an aggravated assault and battery. The indictment was in two counts. The second of which was as follows: "The grand jurors aforesaid upon their oath aforesaid do further charge and present that Henry Throckmorton, at said county of Allen and state of Indiana, on the seventh day of October, A. D. 1875, in and upon one William Meredith did make an assault, and him, the said William Meredith did then and there feloniously and unlawfully touch, in a rude, insolent and angry manner, with intent then and there and thereby him, the said William Meredith, unlawfully and feloniously to kill, contrary to the form of the statute, &c." This count was quashed by the court below, on the ground that it charged an assault and battery with intent to commit manslaughter, and the court being of the opinion that there was no such crime known to the law.

Samuel M. Hench, prosecuting attorney for the state.

Stratton & Stratton, for appellee.

The opinion of the court was delivered by

DOWNEY, J.—Of manslaughter there are two kinds, voluntary and involuntary. It may be conceded that there can be no such thing as an assault, or an assault and battery, with intent to commit manslaughter of the involuntary kind. But not so we think as to voluntary manslaughter. The statute defines manslaughter as follows: "If any person shall unlawfully kill any human being without malice, express or implied, either voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act, such person shall be deemed guilty of manslaughter, &c.:" 2 G. & H. 438, sect. 8. The next following section is the one on which this indictment is founded. It reads as follows: "Every person who shall perpetrate an assault or an assault and battery with intent to commit a felony, shall, upon conviction thereof, be imprisoned, &c." We are aware that many criminal lawyers of this state are of the opinion that there can be no such thing as an

assault, or an assault and battery, with intent to commit manslaughter. It is said by Judge Bicknell in his work on Criminal Law, that "there can be no indictment for an assault and battery with intent to commit the crime of manslaughter, because the peculiarity of manslaughter is that it is free from unlawful intention to kill:" Bicknell's Crim. Prac. 292. It is a mistake to say that there can be no unlawful intention to kill in voluntary manslaughter: *Murphy* v. *The State*, 31 Ind. 511. Mr. Bishop, in his work on Statutory Crimes, sect. 508, expresses the opposite view to that taken by Judge Bicknell, and thinks such view contrary to the actual course of things in the other states, and "not sound as general American doctrine." In New Hampshire there was a statute providing "that if any person shall make an assault upon another, with intent to commit any crime described in this chapter, the punishment whereof shall be, &c., he shall be punished," &c., and manslaughter was among the crimes described; it was held that this provision embraced among the rest an assault with intent to commit manslaughter: *The State* v. *Collegan*, 17 N. H. 253. In *Murphy* v. *The State*, *supra*, the court, in speaking of the instructions given, said: "By these instructions the jury were told in effect, that there could be no purpose to kill in manslaughter, and that if such a purpose were shown to exist, the killing would be murder. This we think is not a correct exposition of the law. The killing may be unlawful and purposely done, and yet, if it is done without malice, in a sudden heat and transport of passion, caused by a sufficient provocation, it is only manslaughter. It was so held in *Dennison* v. *The State*, 13 Ind. 510." A reference to the case in 13 Ind. will show that the question was there so decided. The case of *Dennison* v. *The State* is cited and followed in *Hoss* v. *The State*, 18 Ind. 349, and *Long* v. *The State*, 46 Ind. 582. But notwithstanding we are of the opinion that the second count in the indictment was good, we cannot reverse the judgment because the court held it bad. The first count charged the defendant with an assault and battery with the intent feloniously, purposely and with premeditated malice to kill and murder. Upon this count the prisoner was tried and acquitted. There is no doubt, we think, that the defendant might, had the evidence warranted it, been found guilty on the first count of an assault and battery with intent to commit manslaughter: Bishop's Statutory Crimes, sect. 503. The state was not, therefore, injured by the ruling of

the court in quashing the second count of the indictment. It will follow from this ruling that a party indicted for an assault, or an assault and battery with intent to commit murder in the first degree, may, if the evidence justify it, be convicted of the assault, or assault and battery with intent to commit murder in the first or second degree, or to commit manslaughter, or he may be acquitted of any felonious intent and found guilty of the assault or assault and battery only. It has been held that a party may be indicted of an assault, or an assault and battery with intent to commit murder in the second degree: *The State* v. *Kesler*, 8 Blackf. 575. In such case, therefore, there may be a conviction, if the evidence warrant it, of the assault or assault and battery, with intent to commit murder in the second degree, or to commit manslaughter, or, as in the other case, there may be an acquittal of any intent to commit a felony, and a conviction of the assault or assault and battery only. If a party be indicted of an assault or an assault and battery with intent to commit manslaughter, he may in a proper case be convicted of the whole charge, or he may be acquitted of the intent to commit manslaughter and found guilty of the misdemeanor only. These rules are deducible from sect. 72, p. 405, 2 G. & H., which provides that upon an indictment for an offence consisting of different degrees, the jury may find the defendant not guilty of the degree charged, and guilty of any degree inferior thereto. The judgment is affirmed.

Supreme Court of New Brunswick.

THE SPRING HILL MINING COMPANY *v.* SHARPE ET AL.

The condition of a bond given for the faithful discharge of the duties of the treasurer of an incorporated company, declared that S. (the treasurer) should well and truly account with the company, and the directors thereof, whenever required, for all moneys, &c., which should come into his hands as treasurer, and should well and faithfully obey all such by-laws, orders, directions and instructions as the board of directors of the company should make, prescribe and appoint. One of the by-laws of the company required that the treasurer should make his cash deposits in the bank of New Brunswick, as the money was received, and that all checks to draw the same should be signed by the president, or two directors of the company, and countersigned by the treasurer. In an action on the bond, alleging as a breach, that S. had received money as treasurer, which he had neglected to pay over on request, and had converted to his own use, the surety pleaded, that before any breach of the bond, S., with the knowledge, consent and authority of the directors, did not deposit the money in the bank of New Bruns-

wick, but kept it in his own custody, and paid it out on his own check, and as he thought proper. *Held*, on demurrer, that an order of the directors, not warranted by the act of incorporation or the by-laws, was no justification for the treasurer in misappropriating the money, and did not relieve the surety from liability.

DEBT on a bond given for the faithful discharge of the duties of the treasurer of an incorporated company. Demurrer to the pleas by the surety.

The opinion of the court was delivered by

ALLEN, C. J.—This is an action on a bond given by the defendant Sharpe, as treasurer of the Spring Hill Mining Company, and by the other defendant, Saunders, as surety, for the faithful performance of Sharpe's duties as treasurer. The bond, after reciting that Sharpe had been appointed treasurer of the company, to perform such duties as properly belonged to the office of treasurer, or as the directors of the company might at any time thereafter order, direct and appoint to be done by him as such treasurer, stated the condition of the bond to be, *inter alia*, that Sharpe should at all times thereafter, so long as he continued to be employed as treasurer, well and faithfully behave himself in all things relating to the said office, or to duties to be required of, or performed by him for the company, and should well and truly account with the company and the directors thereof, whenever thereto required, for all moneys, funds, securities, books, &c., which should come into his hands during his service as treasurer, and pay over and deliver the same, or any of them, when required by the company, or the directors for the time being, to such person or persons as the directors might appoint and direct to receive the same; and should well, truly and faithfully obey and keep all such by-laws, regulations, orders, act of incorporation, directions and instructions, as the board of directors for the time being, of the said company, should make, ordain, prescribe and appoint. The breaches assigned, were: 1st. That while Sharpe held the office of treasurer, he wrongfully withheld and misapplied divers sums of money, to wit, the sum of $9194, which had been collected and received by him as treasurer on account of the plaintiffs, and converted the same to his own use. 2d. That while Sharpe held the office of treasurer, the sum of $9194 was received by him as such, and though often requested so to do, he did not account for the same to the plaintiff, but wholly neglected and omitted so to do. 3d. That the sum of $9194 came into the hands of Sharpe as treasurer of the company,

and, though often requested by the plaintiffs, he did not pay over and deliver the said money to them, but wholly neglected and omitted so to do.

The defendant, Saunders, pleaded, 1st. That by a by-law of the company passed on the 19th May 1873, it was provided that the treasurer should make his cash deposits in the bank of New Brunswick, or such other bank as the directors should appoint, as the money was received, and that all checks to draw the same should be signed by the president, or two directors of the company, and countersigned by the treasurer. That by a further by-law passed at the same time, it was provided that the directors should have the general supervision of the affairs of the company. That the directors appointed the bank of New Brunswick as the bank in which the treasurer was to make his cash deposits. That before any breach of the condition of the bond, Sharpe, with the knowledge and consent of the directors of the company, and without the knowledge or consent of the defendant, Saunders, lent the money to other persons, whereby the defendant Saunders was discharged from liability; and that all such loss as had been sustained by the plaintiffs, by reason of the supposed breaches of the condition of the bond, had arisen by and through the negligence and misconduct of the directors, and not otherwise. 2d. That before any of the supposed breaches, all the moneys of the plaintiffs in the hands of Sharpe, by the carelessness and neglect of the plaintiff and of the directors, and in disobedience of the by-laws of the company, were not deposited in the bank of New Brunswick as required by the by-laws, but were, with the knowledge, consent and authority of the directors, and without the knowledge or consent of the defendant, Saunders, kept by Sharpe in his custody, and by the like knowledge, consent and authority of the directors, and without the knowledge or consent of the defendant, Saunders, were not drawn out of any bank by check, signed by the president or two directors, and countersigned by the treasurer of the company, but were paid out by Sharpe by his own check, or otherwise, as he thought proper; whereby the defendant, Saunders, was discharged from liability for Sharpe in that respect.

I think both these pleas are bad. Assuming that there is no substantial difference between an act done by Sharpe with the *consent*, and an act done by the *authority*, of the directors, the pleas allege, and admit that it was Sharpe's duty, under the by-laws of

the company, to deposit in the bank of New Brunswick the moneys which came into his hands; that he did not do so; but, with the knowledge, consent and authority of the directors, kept the money in his own custody, and lent it, or paid it out as he thought proper and not in the manner prescribed by the by-law. These pleas raise the question whether an order of the directors, made in violation of a by-law of the company, will relieve the surety of the treasurer from liability. I think it will not. The obligation which the surety enters into is, that Sharpe shall keep and obey the by-laws; and certainly, the mere consent of the directors that he should violate them, will not discharge the surety. But I put the case as a broader ground, viz.: that an order of the directors not warranted by the act of incorporation or the by-laws of the company, is no justification of the officer, and will not relieve the surety.

The principle involved in this case, is fully considered, and the law very clearly laid down by Mr. Justice STORY, in the case of *Minor* v. *The Mechanics' Bank of Alexandria*, 7 Curt. 445. That was an action against the sureties in a bond given for the faithful discharge of the duties of the cashier of a bank. One ground of defence was, that by the usage and practice of the bank, the cashier had allowed customers to overdraw their accounts and to leave their checks and notes charged without funds in the bank to meet them; and it was contended on behalf of the sureties, that the jury should have been instructed that those facts constituted a defence to the action. Mr. Justice STORY, delivering the judgment of the court, said: "If the instruction had been given, and thereupon a verdict upon these issues had been found for the defendants, could any judgment have been given upon these issues in favor of the defendants; or, ought judgment *non obstante veredicto* to have been for the plaintiff? If it ought, then the error becomes wholly immaterial, since in no event could the instruction, in point of law, have benefited the defendants. Upon deliberate consideration we are of opinion that the pleas on which these issues are founded are substantially bad. They set up a defence for the cashier, that his omission well and truly to perform the duties of cashier, was by the wrong connivance and permission of the board of directors. The question then comes to this, whether any act or vote of the board of directors, in violation of their own duties, and in fraud of the rights and interest of the stockholders of the bank could

amount to a justification of the cashier, who was a *particeps criminis?* We are of opinion that it could not. However broad and general the powers of the direction may be for the government and management of the concerns of the bank, by the general language of the charter and by-laws, those powers are not unlimited, but must receive a rational exposition. It cannot be pretended that the board could by a vote, authorize the cashier to plunder the funds of the bank, or to cheat the stockholders of their interest therein. No vote could authorize the directors to divide among themselves the capital stock, or justify the officers of the bank in an avowed embezzlement of its funds. The cases put are strong, but they demonstrate the principle only in a more forcible manner. Every act of fraud, every known departure from duty by the board, in connivance with the cashier, for the plain purpose of sacrificing the interest of the stockholders, though less reprehensible in morals, or less pernicious in its effects than the cases supposed, would still be an excess of power, from its illegality, and, as such, void as an authority to protect the cashier in his wrongful compliance. Now, the very form of these pleas sets up the wrong and connivance of the board as a justification; and such wrong and connivance cannot for a moment be admitted as an excuse for the misapplication of the funds of the bank by the cashier. The instruction prayed for, proceeds upon the same principles as the pleas. It supposes that the usage and practice of the cashier, under the sanction of the board, would justify a known misapplication of the funds of the bank. What is that usage and practice, as put in the case? It is a usage to allow customers to overdraw, and to have their checks and notes charged up, without present funds in the bank. Stripped of all technical disguise, the usage and practice thus attempted to be sanctioned, is a usage and practice to misapply the funds of the bank, and to connive at the withdrawal of the same, without any security, in favor of certain privileged persons. Such a usage and practice is surely a manifest departure from the duty both of the directors and the cashier, and cannot receive any countenance in a court of justice. It could not be supported by any vote of the directors, however formal; and, therefore, whenever done by the cashier, is at his own peril, and upon the responsibility of himself and his sureties."

This clear exposition of the law, and its applicability to the ques-

tion now before us, warrants the somewhat lengthy quotation of the language of the learned judge, which seems to me to be conclusive against the pleas in this case.

Obedience of the by-laws by Sharpe, was one of the very things for which the surety bound himself. Can he be heard to say that he is absolved from his liability for a breach of those by-laws, because the directors of the company, in breach of their duty, either consented to, or authorized the violation of them by Sharpe? No order or direction of the directors with respect to the funds of the company, unless within the legitimate authority of the board, would be any justification to the treasurer. An order authorizing him to retain the money in his own possession, and to pay it out to whomsoever he pleased, either by his own check, or otherwise, in direct violation of the by-law which requires the money to be paid into the Bank of New Brunswick, and to be checked out in a particular way, is a clear departure from the duty both of the directors and of the treasurer, and to use the language of Mr. Justice STORY, cannot be supported by any vote of the directors, however formal. This principle was acted on in this court, in the case of *Fellows* v. *The Albert Mining Co.*, 3 Pugs. 203, where it was held that a resolution of the directors of the company, voting a salary to the president, which was not authorized by the act of incorporation, was invalid, and that no action could be maintained on a bond or certificate of indebtedness under the corporate seal, founded on such resolution.

The defendant's counsel relied on the language of Lord BROUGHAM in *Mactaggart* v. *Watson*, 3 Cl. & F. 542, where, speaking of the liability of sureties, and the duties of creditors to conduct themselves according to law, he says: "All this may be generally true, and yet, it cannot avail to discharge a surety who has expressly bound himself for a person's doing certain things, unless it can be shown that the party taking the security has by his conduct either prevented the things from being done, or connived at their omission, or enabled the person to do what he ought not to have done, or leave undone what he ought to have done, and that but for such conduct the omission or commission would not have happened."

It was contended that the present case came entirely within those principles; that the plaintiffs by their acts and conduct had

enabled Sharpe to do what he ought not to have done as treasurer, and that they could not take advantage of their own wrongful act. Had the plaintiffs been individuals suing in their own right, and capable of acting in person, I am not prepared to dispute the proposition; but I think there is a difficulty in applying the same rule to a corporation. The directors are merely the agents of the company. Their duties are pointed out by the act of incorporation, or prescribed by the by-laws, which are the promulgated will of the company. While they act within the limits of the authority thus given them, the company is liable for their acts; but beyond those limits cannot bind their principals. See the case of *The Salem Bank* v. *The Gloucester Bank*, 17 Mass. 28. As the by-laws of the company are expressly referred to in the bond in this case, the sureties are bound to know the duties they prescribe, and it is no justification to say that the directors authorized the treasurer to violate the by-law, and to commit a breach of his duty.

It was also contended, that as by the condition of the bond the treasurer was bound to obey the orders of the directors, any order they made respecting the appropriation or payment of the funds of the company, was a justification to him, if he acted in accordance with it, and a discharge of his sureties. But those words of the condition must receive a reasonable construction; they must necessarily mean, such orders, directions and instructions as the directors can lawfully make and give, not any orders they may choose to make in excess of their powers. The general supervision over the affairs of the company, which the directors have, must be exercised within the limits of their duties as defined by the act of incorporation and the by-laws. To give the words of the condition the unlimited construction contended for, would entirely defeat the object for which the by-law was passed, directing the company's moneys to be paid into the bank, and the manner in which they were to be drawn out. This construction, therefore, cannot prevail.

For these reasons, I think the pleas are bad, and that the plaintiffs are entitled to judgment on the demurrers.

The rest of the court concurring, judgment for the plaintiffs.